FILED
JAN 17 1927
WM. R. STANSBURY
Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. [redacted] 39

[redacted], Petitioner

vs.

W. F. WELLS, Respondent

# BRIEF FOR RESPONDENT

W. CALVIN WELLS
Counsel for Respondent

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NO. 328

**GULF, MOBILE & NORTHERN RAILROAD COMPANY, Petitioner**

**Vs.**

**W. F. WELLS, Respondent**

# BRIEF FOR RESPONDENT

## STATEMENT OF CASE

W. F. Wells, respondent, brought this suit in the Circuit Court of Jones County, Mississippi, against the Gulf, Mobile and Northern Railroad Company, petitioner, for personal injuries, in which court there was a verdict and judgment for respondent and the case was appealed to the Supreme Court of the State of Mississippi, where judgment was affirmed.

The declaration is in three counts, only one of which is necessary to notice on this appeal, and that is the second count of the declaration. In this second count, respondent based his right to recover upon the following allegations of negligence:

> "That plaintiff, while engaged as a brakeman for said defendant on the said train, and while doing and performing the duties of the said brakeman in the town of Stratton, an incorporated town in the State of Mississippi about 100 or 200 feet of the depot at Stratton on the line of the Gulf, Mobile and Northern Railroad Company, the plaintiff undertook to get on the said freight train, at a time when the train was moving, as it was his duty to do, and as he caught hold of the hand-iron on siad train, he stumbled on a piece of coal which was negligently left on the yard and just at the time he stumbled, the engineer on said train gave a very sudden and very unnecessary jerk of said train and carelessly and negligently jerked him from said train and caused him to fall on the ground, causing him to suffer very serious and permanent injury, which is more fully set out herein."

To this allegation and declaration petitioner filed a plea of the general issue.

The facts developed on the trial of the case show that the respondent was engaged in the performance of his duty as a brakeman on a freight train of the petitioner; that on the occasion of the injury complained of, the crew in charge of petitioner's train had just completed some switching on the yards of petitioner in the town of Stratton, and that the train was made up and ready to go. That the train in question was headed south on the main line tracks of petitioner. The engineer on said train was in the cab on the west side of the engine, the fireman was in the cab on the

east side of the engine, the conductor and flagman were in the caboose at the rear of the train and respondent was on the east side of the train near the caboose. It was a light train with very few cars attached thereto. Respondent "high-balled" the fireman, who was taking signals for the engineer, that he was ready to go. Just after the "high-ball" signal was given, the conductor, **who was in charge of the train,** whose orders it was respondent's duty to obey, ordered respondent to throw a derail switch about 50 feet away from the caboose. Respondent threw this switch after the train had been set in motion, and then ran back to catch the moving train. Just as respondent took hold of the grab-iron on the east side of one of the cars in said train, he stepped upon a lump of coal, his foot turned, and at the same time, the engine of said train gave a very unusual jerk or lurch.

"Q. Tell the jury just how you were injured?

A. As I grabbed the grab-iron I stepped on this piece of coal and I went down and the engine gave an unusual jerk and threw me and my knee struck on the crossties." (R., p. 21).

A jerk or lurch such as he had never before experienced before on a train.

"Q. When you were on a train you have had such a severe jerk as you had there?

A. No.

Q. You never had that?

A. No.

Q. This was a jerk such as you never experienced before on a train——that right?

A. Yes." (R., p. 37).

(and he was an experienced brakeman)

"Q. Have you ever been employed by the G. M. & N. R. R.?

A. Yes.

Q. In what capacity?

A. Brakeman.

Q. When employed by them?

A. In April, May, part of June and July, 1924.

Q. When you went to work in what capacity did you work?

A. My job?

Q. Yes?

A. As brakeman.

Q. Worked all the time as a brakeman?

A. Yes." (R., p. 19).

A very unnecessary lurch on a light train, such as the train in question.

"Q. You say the run in of the slack gave a lurch—dose not the engine sometimes give a lurch to a train?

A. Yes.

Q. And if a light train be more liable to give a lurch than a heavy train?

A. Would not give the lurch——would not be necessary." (R., p. 55).

This lurch or jerk jerked respondent loose from the train and thereby caused him to fall on the end of the crossties, which caused the injury complained of. This jerk, or lurch of the train was given at a time when the fireman who was sitting in the engineer's stead, and taking signals from the respondent, knew, or by the exercise of reasonable care could have known, the position of respondent.

"Q. Which side of the train was that on?

A. Left hand side facing South.

Q. Which side of the conductor work on?

A. On the same side.
Q. The engineer—I mean.
A. Right hand side.
Q. When he is on the right hand side who is it gives him orders on the left side?
A. Fireman—taking signals.
Q. Was the fireman on the left side?
A. Yes.
Q. Was he in a position to see where you were?
A. Yes.
Q. And could see where you were?
A. Yes." (R., p. 24).

The case was submitted to the jury upon the issue of whether or not the respondent's injuries were proximately caused by a sudden or unusual jerk of the train, at a time when he was attempting to board it. These issues were sharply drawn by the pleadings and by the evidence, and the instructions fairly presented the law, and most abunbantly presented the law for the petitioner, as will be shown by the record. (R., p. 11, 12, 13).

There was a verdict and judgment for the respondent, and the case was appealed to the Supreme Court of the State of Mississippi, which court affirmed the judgment, and petitioner brings the case here on writ of certerori.

## BRIEF OF ARGUMENT

Counsel for petitioner in his brief to this court assigns only three grounds of error in the court below, namely:

First:

That the court erred in refusing to instruct the jury at the close of the whole case, to find for the defendent.

Second:

That there was error in refusing to grant petitioner the following instruction:

> "The court instructs the jury for the defendant, that if you believe from the evidence, that the crew of the engine did not know that the plaintiff was not aboard the train, it is your sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train."

Third:

"That the court erred in refusing to grant petitioner the following instruction:

> "The court instructs the jury that even though you may believe from the evidence that there was an unusual lurch, still if said lurch was occasioned by the slack between cars running in or out, it is your sworn duty to find for defendant."

We will attempt to answer the alleged errors complained of in the order named.

## ARGUMENT

### I.

### DID THE COURT ERR IN REFUSING TO DIRECT A VERDICT FOR PETITIONER?

In deciding this question, this court will take the most favorable statement of plaintiff's case to be true, and if, when looked at from its most favorable light, there is evidence sufficient to show negligence, proximately causing respondent's injuries, this court will not disturb the judgment.

Texas and Pacific Railway Company vs. Abe Behymer, 189 U.S. 486 32 Sup. Ct. Rep.622, Great Northern Rail-

road Company vs. O. B. Knapp, 240 U. S. 464, 466; 69 L ed., 745, 751, 36 Sup. Ct. Rep. 399, Seaboard Air Line Company vs. Padgett, 236 U. S. 688, 673; 59 L ed. 777, 781, 35 Sup. Ct. Rep. 481; Seaboard Air Line Company vs. Koennecke, 296 U. S. 352, 355 L ed., 36 Sup. Ct. Rep. 126, Walters Pierce Oil Company vs. State of Texas, 212 U. S. 86, 29 Sup. Ct. Rep. Great Northern Railroad Company vs. Donaldson, 246 U. S. 121, 38 Sup. Ct. Rep. 230.

The respondent testified that at the time of the injury he attempeted to catch the moving train and that just as he took hold of the grab-irons on the side of the box car, that the engine gave an unusual jerk, (R., p. 21.); a jerk such as he had never experienced before on a train, (R., p. 37), and that he was an experienced brakeman, (R., p. 19); that this jerk or lurch of the train jerked him entirely loose from the train and that his injuries were caused thereby.

Petitioner's conductor, one of petitioner's witnesses on the trial of the case in the court below, testified that such a lurch was unnecessary in handling a train like the one in question, (R., p. 55). Respondent also testified that this lurch or jerk of the train was given at a time when the fireman, who was sitting instead of the engineer on his, respondent's, side of the train, taking signals from respondent, and when he knew, or could have known respondent was about to board the train.

Can this court say, as a matter of law, that such a statement of facts are not sufficient to show negligence? We do not think so. This court, in the case of Texas Pacific Railway Company vs. Abe Bahkmer, supra, a case, the facts of which are similar to the facts in this case, had this to say:

> "No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of. Yet, it can be avoided, if necessary, and when the particular and known condition of the

> train makes a sudden bump, obviously dangerous to those known to be on top of the cars, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty."

It has been the rule of this court that questions as to whether or not jerking and lurching of freight trains was negligence on the part of those in charge of the operation of such trains, under certain circumstances were questions to be decided by the jury, and not questions of law to be decided by the court, but we submit that, taking the most favorable statement of this case for respondent, as the record discloses, that the court would be warranted in saying as a matter of law, that such handling of a train, under such circumstances, constituted negligence on the part of those in charge of the operation of the train.

In the case of Birmingham, etc., Company, vs. Wilmer, 97 Alabama, 165, 11 Sou. 886, where the court had under consideration the question of a lurch or jerk of a train whereby a man was injured, the court had this to say:

> "Moreover, it is not disputed that plaintiff was knocked over by, or fell off the train in consequence of this jerk. This was, of itself, some evidence for the jury that the jerk was unusual, and negligently severe."

In the case at bar, it was not disputed that respondent was jerked from the train by the sudden lurch. Applying the same principle of law, this was, of itself, some evidence for the jury that the jerk was unusual and negligently severe.

Counsel for petitioner takes up a great deal of his time in arguing conflictions in the testimony, and quotes the parts of the record most favorable to his cause, but we submit that when the most favorable statement of the case for respondent, disclosed by the record, is taken, that there

was sufficient proof of negligence to warrant the finding in favor of respondent.

It is urged by counsel for petitioner, that the evidence is not sufficient to show that the engineer caused the lurch, but in this contention, he quotes only from his own witnesses. Respondent says, (R., p. 21.) that the engine gave a sudden lurch, and he was an experienced brakeman, just as much so as the other members of the crew in charge of said train, and even though it might be said that he did not see the engineer cause the lurch, he had the same right to state, from his opinion, what caused the lurch, as did the other members of the crew, and then it was a question for the jury to decide, and to which they had a right to apply their common, every-day experience as men, and to judge from all the facts, the surrounding circumstances, and from their experiences as men, what caused the lurch or jerk.

We are aware that the members of this court are human beings, and that they have had some experience in riding trains and observing the operation of trains, and they will know that the contention that an engineer in charge of the operation of a train cannot cause a jerk or lurch of a train, is too frivilous to deserve serious consideration.

Again counsel for petitioner states, on page 14 of his brief, that:

> "Respondent swears that the jerk was unusual. He does not say that it was violent or that it was unnecessary."

but in this, we insist that counsel is in error.

On page 37 of the record, respondent swears that this jerk or lurch was such a jerk or lurch as he had never experienced before on a train, and petitioner's witness, the conductor in charge of the said train, testified that such a jerk or lurch was unnecesasry, (R., p. 55). So we submit that there was sufficient evidence to show negligence, when

taken in its most favorable light for the respondent, that the evidence was conflicting, and under this state of the case, this court will not disturb the judgment.

## II

## DID THE COURT ERR IN REFUSING TO GRANT PETITIONER'S INSTRUCTION THAT IF THE CREW OF THE ENGINE DID NOT KNOW RESPONDENT WAS NOT ABOARD THE TRAIN, TO FIND FOR PETITIONER?

We insist that this instruction did not state the law applicable to the facts in the case. Actual knowledge on the part of the crew of the engine was not necessary for them to be negligent in the operation of the train, but if, by the exercise of reasonable care, they could have known of this, respondent's position at the time of the injury, then they would be guilty of negligence in doing the act, the result of which, respondent was injured.

The Supreme Court of Alabama, in the case of Southern Railway Company vs. Dickson, 211 Alabama, 481; 10 So. 665, says:

> "Upon a review of our cases dealing with liability of Railway Companies for injuries caused by jars or jerks in the operation of their trains, we have recently said:"
>
> "These cases indicate that the sudden jars or jerks in the movement of trains may be held negligent only when they are violent enough to naturally and probably result in injury to someone on the train who is known to be, or to probably be in a position of peril from such a movement, and when they are unnecessary, under the circumstances of the particular case."

Further on, in the same opinion, the court says:

> "We cannot, however, for this cause, reverse

> the judgment for the reason that the admitted allegation was nevertheless made an issue on the trial and the jury was clearly and specifically instructed (Charges 20, 22 and 23) that plaintiff could not recover unless he showed that the engineer operating the train knew, or in the exercise of reasonable care ought to have known, that the plaintiff was in, or would probably be in a position of peril at the time the jerk or shock was caused, if it was caused."

In this opinion the true rule is stated. It was not incumbent upon respondent to show actual knowledge on the part of th ecrew of the train of his position of peril at the time of the lurch or jerk, but if they knew, or in the exercise of reasonable care could have known his position, then they would be liable. Hence, we submit that the instruction about which counsel for petitioner complains, does not properly state the law applicable to the facts.

The trial court granted petitioner an instruction accurately stating the rule applicable to the facts, which instruction reads as follows:

> "The court instructs the jury for the defendant, that if you believe from the evidence that the crew of the train did not know that the plaintiff was aboard the train, and was guilty of no negligence in not knowing, it is your sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train." (R., pp. 12 and 13).

## III

DID THE COURT ERR IN REFUSING TO GRANT PETITIONER'S INSTRUCTION TO THE EFFECT THAT IF THE LURCH WAS OCCASIONED BY SLACK THE JURY MUST FIND FOR PETITIONER?

Counsel for petitioner complains of the refusal to grant his instruction to the effect that even though the jury may believe from the evidence that there was an unusual lurch, still if such lurch was occasioned by the slack between the cars running in or out, it was their sworn duty to find for the defendant. This instruction does not correctly state the law. The slack in the train running in or out, might have occasioned the injury, and yet might not have been the proximate cause of the injury, or the sole cause of the injury.

If petitioner's instruction had stated that if the jury believed that the slack running in or out was the sole cause or the proximate cause of the injury, this would probably have stated the correct rule of law, but it did not so state the rule.

Respondent, therefore, respectfully submits that petitioner's assignments of error are groundless, and that his petition should be dismissed and the judgment of the State Court affirmed.

Respectfully submitted,
W. CALVIN WELLS,
Attorney for Respondent.